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No. 73-518

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In the Supreme Court of the United States

OCTOBER TERM, 1973

JAMES ARTHUR WILLIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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After a jury trial in the United States District Court for the Western District of Missouri, petitioner was convicted of having transported women in interstate commerce for the purpose of prostitution, in violation of 18 U.S.C. 2421 (the Mann Act), and of having traveled and caused travel in interstate commerce to facilitate prostitution enterprises illegal under state law, in violation of 18 U.S.C. 1952. He was sentenced to concurrent sentences of five years' imprisonment on each count. The court of appeals affirmed in a comprehensive opinion (Pet. App. A).

1. Petitioner's claims that the cross-examination of him by the government concerning certain income tax forms was improper, that the trial court erred in permitting a witness to invoke her Fifth Amendment rights in the presence of the jury, and that the arrest record of one

of his associates should not have been received into evidence are fully answered in the opinion of the court of appeals, upon which we rely (Pet. App. A3-A11).

2. Petitioner's claim that he was denied his right to a speedy trial is without merit. He was originally arrested and indicted on October 7, 1971,[1] for offenses covering the period January 1, 1968, to February 22, 1970. The evidence presented at trial primarily concerned unlawful conduct by petitioner between January and April 1968. In *United States* v. *Marion*, 404 U.S. 307, this Court held that the speedy trial provision of the Sixth Amendment has no application until the putative defendant becomes an "accused" by being arrested or charged with a crime. 404 U.S. at 313.[2] In light of that decision, petitioner, who complains only of delay occurring before his indictment and arrest, cannot assert a Sixth Amendment claim.

Marion recognized that in certain circumstances, even though the statute of limitations has not expired, pre-indictment delay might so impair a defendant's capacity to prepare a defense as to violate his Fifth Amendment right to due process and require dismissal of the prosecution. 404 U.S. at 324-325. However, petitioner has not made the kind of specific showing of prejudice that is needed to substantiate a due process claim. He principally complains that the passage of time dimmed the memories of the government's witnesses, especially with regard to the specific dates on which events occurred. But the

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[1] A superseding indictment was returned on April 8, 1972, which corrected a typographical error in the original indictment.

[2] As this Court noted in *Marion*, Rule 48(b), Fed. R. Crim. P., which authorizes dismissal of an indictment "[i]f there is unnecessary delay in presenting the charge to a grand jury * * * against a defendant who has been held to answer to the district court * * *," is limited to post-arrest delays. 404 U.S. at 319.

inability of government witnesses to recall some dates exactly and a similar alleged failing in petitioner's memory in no way undermined the basic case against petitioner, which was grounded on his conduct of an illegal prostitution business.[3]

3. Petitioner contends that both the Mann Act and the Missouri prostitution statutes (Mo. Rev. Stats. §§563.010, 563.040) underlying his conviction under 18 U.S.C. 1952 unconstitutionally discriminate between the sexes, because they deal only with female and not male prostitution. The limitation of these statutes to female prostitution reflects, however, not invidious discrimination, but rather the determinations of Congress and the Missouri Legislature that male prostitution does not pose a sufficient social problem to require comparable legislative action. The statutes do not distinguish between male and female offenders. A woman who commits the same acts as petitioner did would also violate the law. The constitutionality of 18 U.S.C. 2421 was recently sustained in *United States* v. *Marks*, 475 F. 2d 1405 (C.A. 7),

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[3] Petitioner also argues that the trial court erred in refusing to instruct the jury to acquit him if they found that the government failed to bring the prosecution within a reasonable time. Whether such prejudice exists as to prevent a fair trial is a matter for determination by the court.

certiorari denied, No. 72-6713 (October 9, 1973), in the face of similar challenge.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1973.

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[4] A different result is not required by this Court's decision in *Frontiero* v. *Richardson*, 411 U.S. 677, or the other lower court cases cited by petitioner (Pet. 21) concerning the constitutionality of statutes making prostitution or the solicitation therefor by a woman, but not by a man, a crime. In such cases, unlike this case, the challenged statutes, either on their face or as applied, made criminal certain conduct by members of one sex, although the same conduct by members of the opposite sex was not criminal. Petitioner is not affected by, and thus can base no claim upon, the fact that 18 U.S.C. 2421 does not apply to transportation of men for the purpose of prostitution.

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